



Australian Government

Australian Public Service Commission

Anonymous

By Email: foi-request-8834-ae113974.k48q6.22sp3@aleeas.com

Our Reference: LEX 710

Dear Applicant,

DECISION UNDER THE FREEDOM OF INFORMATION ACT 1982

Freedom of Information request

1. I am writing about your request dated 13 November 2023, to the Australian Public Service Commission (the Commission) for access to documents under the *Freedom of Information Act 1982* (FOI Act).
2. Your request was for:

I am making this request for access to documents that may be in the control of the Australian Public Service Commission.

If the documents are not in the control of the APSC, do not transfer this request to the agency that officials in the APSC believe has the documents. If the requested documents are not in the control of the APSC, please simply refuse access to the documents under section 24A of the FOI Act.

*As to my right to elect whether I would like the APSC to deal with this request and not transfer it to another agency, I refer you to the Federal Court of Australia's judgment in *Bienstein v Attorney-General* [2007] FCA 1174, [38]. The law on the matter is settled and clear.*

Access request

Under the FOI Act, I request access to any and all documents setting out the submissions of, or containing information received from, each of the following persons in response to requests for information issued as part of Kate McMullan's investigation into allegations that senior administrators in the Federal Court of Australia contravened the Code of Conduct when engaging or promoting registrars of the Federal Court of Australia:

- a) Catherine Sullivan (of the Federal Court of Australia Statutory Agency);

b) Kathryn Hunter (of the Federal Court of Australia Statutory Agency);

c) Drew Pearson (an unsuccessful candidate for the Senior Executive Band 2 classified Senior National Judicial Registrar vacancy (see vacancy NN 10725156 in Public Service Gazette 19 of 2018) in the Federal Court of Australia).

Addressing paragraphs a to c of my request discretely

Please ensure that you address the paragraphs of my access request discretely.

False practical refusal claims

Melanie McIntyre, the Chief Counsel of the Australian Public Service Commission and an SES employee, should avoid making false claims about the existence of practical refusal grounds in respect of this FOI request.'

3. I am an officer authorised under subsection 23(1) of the FOI Act to make decisions in relation to Freedom of Information (FOI) requests.
4. The purpose of this letter is to provide you with a decision on your request under the FOI Act.

My decision

5. All reasonable steps have been taken to find the documents referred to in your request including a search of our records management system and email accounts.
6. I am satisfied that the searches conducted were thorough and all reasonable steps have been taken to locate documents relevant to your request. I am satisfied that the documents referred to in your request do not exist.
7. On this basis, I refuse your request for access to the documents referred to in your request pursuant to section 24A of the FOI Act.
8. In making this decision I have had regard to:
 - the terms of your request;
 - your emails to the Commission revising the date range, outlined below;
 - the FOI Act; and
 - the FOI Guidelines issued by the Australian Information Commissioner.

Reasons

9. Subsection 24A(1) of the FOI Act provides:

'An agency or Minister may refuse a request for access to a document if:

(a) all reasonable steps have been taken to find the document; and

(b) the agency or Minister is satisfied that the document:

(i) is in the agency or Minister's possession but cannot be found; or

(ii) does not exist.'

10. The Office of the Australian Information Commissioner (OAIC) has issued [guidelines](#) under section 93A of the FOI Act. At paragraphs 3.88 to 3.93 of these guidelines, the OAIC provides guidance as to the meaning of the term 'all reasonable steps' in subsection 24A(1).
11. Under paragraph 3.88 of the guidelines, 'all reasonable steps' is taken to mean 'not going beyond the limit assigned by reason, not extravagant or excessive, moderate and of such an amount, size or number as is judged to be appropriate or suitable to the circumstances or purpose'.
12. Under paragraph 3.89 of the guidelines, at a minimum an agency takes 'all reasonable steps' having regard to the:
 - subject matter of the documents
 - current and past file management systems and the practice of destruction or removal of documents
 - record management systems in place
 - individuals within an agency or minister's office who may be able to assist with the location of documents, and the age of documents.
13. Your FOI request refers to an investigation on which the Commission holds a number of documents (including a large number of documents relating to FOI requests). To help clarify your request the Commission wrote to you on 27 November 2023 to confirm if there was a date range relating to your request. We wrote:

'We assume, based on publicly available information (see: [18 March 2022 McKay to Woolcott.pdf \(righttoknow.org.au\)](#)) that you are seeking documents between 11 May 2020 to 9 December 2020. Can you confirm this is the date range in scope for the documents you are requesting?'

14. On 29 November 2023, you responded with the following:

'What a surprising email. Is it not the modus operandi of the Commissioner's "lawyers" to advance false practical refusal reasons to frustrate the freedom of information process? What difference will it make to that mode of operation if I identify a date range? Will the Commissioner's "lawyers" not simply advance lies, and undermine the terms of the Freedom of Information Act 1982 (Cth) and the will of the Federal Parliament?'

In respect of your searches, please limit the date range from 1 May 2020 to 31 December 2020, inclusive of both dates.

*Nice touch with the reference to a publicly accessible document
(<https://www.righttoknow.org.au/request/9867/response/31994/attach/15/18%20Marc>)*

[h%202022%20McKay%20to%20Woolcott.pdf?cookie_passthrough=1](#)) to inform your "assumption". So authentic.'

15. Between 1 December 2023 and 8 December 2023, the Commission carried out extensive searches based on your request and the confirmed date range.
16. To be satisfied that 'all reasonable steps' were taken we required IT to conduct searches for emails received between 1 May 2020 to December 2020, containing the names "Catherine Sullivan", "Kathryn Hunter" and "Drew Pearson"
17. Further, the FOI Officer assisting conducted searches of the above names in all relevant Sharehub (our records management system) folders.
18. The IT searches found hundreds of results containing the names above. The Commission reviewed these results and found that there was no document addressing all relevant terms of your requests a) – c) at paragraph [2] above.
19. After all reasonable searches, **no documents were identified** as falling within the scope of your requests a) – c) at paragraph [2] above.
20. In coming to this conclusion, I am satisfied that for the purposes of paragraphs 3.88 and 3.89 of the guidelines, all reasonable searches were conducted.

Contacts

21. If you require clarification on matters in this letter please contact the Commission's FOI Officer by email at foi@apsc.gov.au.

Review rights

22. You are entitled to seek review of this decision. Your review rights are set out at **Attachment A**.

Yours sincerely,



Melanie McIntyre
FOI decision maker
12 December 2023

Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek review. Before you seek review of a Freedom of Information (FOI) decision, you may contact us to discuss your request and we will explain the decision to you.

Seeking review of a Freedom of Information decision

If you still believe a decision is incorrect, the *Freedom of Information Act 1982* (the FOI Act) may give you the right to apply for a review of the decision. Under sections 54 and 54L of the FOI Act, you can apply for a review of an FOI decision by seeking:

1. an internal review by a different officer of the Australian Public Service Commission;

and/or
2. external review by the Australian Information Commissioner.

There are no fees applied to either review option.

Applying for a review by an Internal Review Officer

If you apply for internal review, a different decision maker will carry out the review. The Internal Review Officer will consider all aspects of the original decision and decide whether it should change. An application for internal review must be made in writing within 30 days of receiving this letter to:

Email: foi@apsc.gov.au

Post: The FOI Officer

Australian Public Service Commission

B Block, Treasury Building

GPO Box 3176

Parkes Place West

PARKES ACT 2600

You do not need to fill in a form. However, it is a good idea to set out any relevant submissions you would like the Internal Review Officer to further consider, and your reasons for disagreeing with the decision.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply in writing for a review by the Office of the Australian Information Commissioner (the OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application**:

Online: www.oaic.gov.au

Post: Australian Information Commissioner

GPO Box 5218

SYDNEY NSW 2001

Email: enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone: 1300 363 992

Website: www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing.

The Ombudsman's contact details are:

Phone: 1300 362 072

Website:
www.ombudsman.gov.au